

No. 11,640

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

ROBERT STROUD,

Appellant,

VS.

JAMES A. JOHNSTON, Warden, United States
Penitentiary, Alcatraz Island, California,

Appellee.

BRIEF FOR APPELLEE.

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FILED

JUL 28 1947

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JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, hereinafter called "the Court below", denying the application of appellant which he designated as a "petition for temporary writ of habeas corpus." (Tr. p. 4.) The appellant has cited certain sections of the United States Code in support of his contention that the Court below had jurisdiction to issue such a writ, but a reading of these sections of the United States Code will show that none of them are authority for the proposition that the Court below had jurisdiction to grant the relief as prayed for.

The appellee does not, however, attack the jurisdiction of this Honorable Court to proceed in this appeal under the authority cited by the appellant.

STATEMENT OF THE CASE.

This is an appeal from an order of the Court below denying the application of appellant, which he designated as a petition for temporary writ of habeas corpus. (Tr. p. 4.) The appellant, an inmate of the United States Penitentiary at Alcatraz Island, California, sought by the application hereinabove mentioned to compel the Court below to order the appellee, the Warden of the United States Penitentiary at Alcatraz Island, California, to bring him before the United States Commissioner at San Francisco, California, so that he could "make his statement and transact all lawful business essential thereto", and that thereafter, at the termination of said "legal business", to return him safely to the custody of the said appellee. (Tr. pp. 2-3.)

The Court below thereafter filed the following order denying appellant's application:

"Petition for temporary writ of habeas corpus having been presented to the court for consideration, and having been duly considered,

"It is ordered that the petition be and the same is hereby denied." (Tr. p. 4.)

From this order appellant now appeals to this Honorable Court. (Tr. p. 4.)

ISSUE.

Does a United States Court have the power to order the Warden of a United States Penitentiary to bring an inmate before a United States Commissioner so that the said inmate may transact certain "Legal Business".

CONTENTION OF APPELLEE.

The answer to the above stated question is, of course: No.

ARGUMENT OF APPELLEE.

The appellant in his brief (page 4) admits that he can find no cases to support the proposition which he advances. To quote him: "The appellant has no training in law, no legal library, and he knows of no case law touching directly upon the point involved in this case * * *" He then goes on to say, however, that he believes the Constitution of the United States guarantees him this protection. He also states that the statute defining the powers and duties of the United States Commissioner may be deemed to justify his contention. This, of course, the appellee disputes. There is no law to sustain the appellant, either Court decisions or statutory law or constitutional provisions.

It is undisputed that the appellant has, by correspondence, access to the Courts and the office of the United States Attorney and the Attorney General. If he has any grievances, let him state them to these

authorities, and if any of his constitutional rights have been violated, he will receive appropriate relief.

In *Walker v. Johnston*, 312 U.S. 275, it was held by the Supreme Court of the United States that where a writ of habeas corpus is issued to test a prisoner's allegation of an illegal restraint of his liberty, the United States Commissioner can not serve as a referee and present his findings to the Court for its approval in lieu of the Court's own findings in the matter.

Furthermore, in *Price v. Johnston*, 159 Fed. (2d) 234, this Honorable Court held that it could not compel the Warden to bring the appellant before it to argue his appeal. Since this Honorable Court does not have the power to compel the Warden of a United States Penitentiary to deliver an inmate before it to argue his appeal, how can it be logically argued that the Court below would have the power to order a prisoner before a Commissioner so that he can state his grievances or transact certain legal business? It is to be noted that the appellant never indicated in his petition the nature of the legal matters he desires presented.

The appellant has been committed to the custody of the Attorney General. The Warden has been designated by the Attorney General as the appellant's custodian. The appellant can only be ordered brought before the Court to challenge the jurisdiction of the trial Court or complain of an unconstitutional deprivation of his liberty (Writ of Habeas Corpus Ad Subjiciendum), or to testify as a witness in a pending proceeding before a Court when and if such testimony

is required (Writ of Habeas Corpus Ad Testificandum), or to be prosecuted, should he be under indictment or information (Writ of Habeas Corpus Ad Prosequendum). None of these situations is present here.

SUMMARY.

The appellant has failed to state a cause of action. His appeal might properly have been dismissed on appropriate motion that it was frivolous and without merit. However, appellee prefers this method of adjudicating the matter, believing that this Honorable Court will render its decision that the Court below has no jurisdiction to order the type of relief as prayed for by appellant, and thus discourage such useless and burdensome litigation.

CONCLUSION.

In view of the foregoing, it is respectfully urged that the order of the Court below is correct and should be affirmed.

Dated, San Francisco,
July 28, 1947.

Respectfully submitted,

FRANK J. HENNESSY,
United States Attorney,

JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.

